WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **301/20**
Applicant: **Kerry Wales**
Respondent: **The Frank Whiddon Masonic Homes of N.S.W. Ltd**
Date of Direction: **24 March 2020**
Citation: **[2020] NSWWCC 89**

The Commission determines:

Findings and Orders

1. The applicant has 15% whole person impairment as a result of injury deemed to have occurred on 19 September 2014.

2. The respondent pay the applicant compensation pursuant to s 66 of the *Workers Compensation Act, 1987* in the sum of $22,000.

JOHN HARRIS
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Kerry Wales (the applicant) was employed by The Frank Whiddon Masonic Homes of NSW Pty Ltd (the respondent) and sustained a compensable injury to the cervical spine deemed to have occurred on 19 September 2014.

2. The applicant commenced proceedings claiming various entitlements including a claim for permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

ARBITRATION HEARING

3. The matter was heard at Tamworth on 17 March 2020 when Mr Harrington of counsel appeared for the applicant and Mr Carney of counsel appeared for the respondent.

4. The issues previously in dispute were narrowed at the arbitration hearing. The applicant discontinued the claim for weekly compensation and the allegation of consequential conditions to the upper extremities. The respondent otherwise admitted that the applicant sustained a cervical spine injury deemed to have occurred on 19 September 2014.

5. The documentation admitted into evidence without objection at the arbitration hearing was:

    (a) Application to Resolve a Dispute and attachments (Application);
    (b) Reply and attachments (Reply);
    (c) Application to Admit Late Documents filed by the respondent (late Application).

6. There was no application by either party to adduce oral evidence.

7. Accordingly, the only outstanding issue was the assessment of the degree of permanent impairment of the cervical spine. The applicant requested that I determine this issue and referred to the decision of the President of the Commission in *Etherton v ISS Properties Services Pty Ltd*[1] (*Etherton*).

8. The respondent objected to the Commission determining the assessment of permanent impairment and requested that the assessment be remitted to the Registrar for referral to an Approved Medical Specialist.

POWER OF THE COMMISSION TO DETERMINE THE EXTENT OF PERMANENT IMPAIRMENT

9. The applicant relied on the decision of *Etherton* and submitted that the Commission can determine the outstanding issue.

10. The respondent submitted that the decision was wrongly decided or does not apply because the Commission does not have power to assess a deduction pursuant to s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

[1] [2019] NSWWCCPD 53.

11. In *Etherton,* the President stated:[2]

> "As can be seen, the relevant alteration is that prior to 1 January 2019 the Commission was prohibited, by virtue of the terms of s 65(3) of the 1987 Act, from awarding permanent impairment compensation absent an assessment by an Approved Medical Specialist. That prohibition was removed and the Commission was then empowered to determine such matters itself."

12. The respondent did not enlarge on its submission that *Etherton* was wrongly decided.

13. I am bound by *Etherton* and reject the respondent's submission.

14. The respondent also submitted that *Etherton* did not apply as that matter did not involve an issue regarding the extent of any s 323 deduction. That submission is incorrect.

15. In *Etherton* the Arbitrator found that the assessment of permanent impairment was 10% after a significant s 323 deduction.[3] The President noted that finding in his reasons.[4] There is otherwise no justification for making a distinction between the power of the Commission to make a determination of the extent of permanent impairment but otherwise be limited in making a determination as to the extent of any s 323 deduction.

16. Since the repeal of s 65(3) of the 1987 Act as and from 1 January 2019, the Commission has power to determine the extent of permanent impairment. I reject the respondent's submission that the Commission has no power or jurisdiction to determine this issue.

THE DEGREE OF PERMAMENT IMPAIRMENT THAT RESULTS FROM INJURY

Submissions

17. It was agreed by counsel that the only difference in the medical opinion was the extent of the s 323 deduction. Submissions were only directed to that issue.

18. The applicant submitted:

    (a) Both Dr Machart and Dr Millons initially assessed the cervical spine at 17% whole person impairment (WPI) and made a 10% deduction pursuant to s 323 of the 1998 Act.

    (b) The whole of the additional information provided to Dr Machart deals with subsequent employment and/or subsequent deterioration.

    (c) The latest opinion provided by Dr Machart is "so ambiguous" as to be of no weight and no assistance in the determination. The doctor gives no reasons why he changed his opinion and this was the third attempt by the insurer to change the doctor's opinion.

    (d) Dr Machart was provided with all the radiology evidence in his second report dated 13 May 2019 and did not change his opinion when provided with that information.[5]

    (e) The applicant provided a detailed history of heavy, arduous work which was not contradicted.

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[2] At [105].
[3] At [58].
[4] At [123].
[5] Reply, p 168.

(f) The reference to some minor pain in 2005 was of no consequence. The applicant had no symptoms from 2006 to 2009, although then conceded that there were minor symptoms in late 2007. The applicant's condition deteriorated in 2009 when the respondent changed the work. The applicant then sought medical treatment.

19. The respondent submitted:

(a) The parties' respective qualified doctors assessed the applicant as having 17% WPI for the cervical spine. The only difference in their final assessments was the extent of the s 323 deduction.

(b) Dr Machart changed his view as to the extent of the s 323 deduction because of subsequent events. It was conceded that part of the reasons for the change in the doctor's opinion was inconsistent with the Court of Appeal decision in *Secretary, New South Wales Department of Education v Johnson*[6] (*Johnson*).

(c) Dr Machart referred to the 2005 history recorded at Wee Waa hospital as part of the doctor's explanation for changing his opinion as to the extent of any s 323 deduction. In these circumstances the doctor had provided a proper basis for changing his opinion, the extent of the s 323 deduction was unclear and the matter should be referred to an Approved Medical Specialist.

Evidence

20. The applicant provided a statement concerning her employment and the nature of her symptoms. The applicant stated:[7]

> "On 8/1/2006 I commenced working for The Frank Whidden Group t/as Weeronga Hostel, an aged care nursing home at Wee Waa. The position of kitchen hand involved a lot of heavy repetitive duties such as food preparation, lifting and carrying 15-20 kg bags of potatoes, washing up, delivering meals, cleaning the kitchen, etc, The cook who worked at the hostel at that time was very messy - sometimes she used almost every pot in the kitchen - so we had to do quite a bit of washing up and cleaning off the benches, in order to keep the kitchen tidy.
>
> By about October 2007 I had begun to notice some niggling pains in my neck and back, going down into my right shoulder. I mentioned this to Dr Sivanathan but I did not really have any specific treatment for these problems until 2010.
>
> In about 2009, the owners of the hostel replaced our old kitchen with a completely new kitchen, Unfortunately the new sink was too low. All Of the staff, including myself, complained about the new sink to the owners, over and over again, before they did anything about it. You had to bend over and lean forwards in order to reach down into the sink to wash up the pots and pans.
>
> **The Injury**
>
> Gradually, over a period of time, I noticed I was developing more severe pain in my neck and both arms from continually bending over the sink to wash up. By early 2010 I had also began to notice numbness in the palms of both hands (initially the right and later both hands), plus a tingling and numbness in my fingers.
>
> ln about April 2010 I consulted my doctor about these problems and he referred me for some tests. I advised my employer about my injuries on or about 21/6/2010 and this is the date the insurer used as my nominated date of Injury. At this time I was placed on light duties at work."

[6] [2019] NSWCA 321.
[7] Application p 1.

21. The applicant set out in some detail the nature of her treatment and subsequent employment. Given the matter in which the case was argued it is largely unnecessary to refer to the applicant's detailed statement save as to note that she complained of ongoing pain in the neck with bilateral arm symptoms.

22. The Emergency Department note of Wee Waa Hospital[8] on 2 April 2005 recorded that the applicant then complained of neck pain after repetitive lifting of many objects and had a history of taking celebrex and voltaren. The notes include a reference to Dr Verma having diagnosed fibromyalgia. The applicant's evidence in respect of this attendance was:[9]

> "I have been advised by my solicitor there is a record of an attendance at Outpatients at Wee Waa Community Hospital on 2/4/2005. The hospital records note I attended complaining of neck pain. I have absolutely no recollection of attending the hospital on that date.
>
> On 2/4/2005 I would have still been employed by IGA Supermarket as a shelf stacker. This work involved quite a bit of repetitive lifting. I was employed by IGA for about two years. I do recall that sometimes I had muscular pain in my neck and shoulders, if I had a particularly busy day at work. Mostly I would treat this with anti-inflammatories or over-the-counter pain medication. This is the only time I can recall having neck or shoulder pain, prior to commencing work at the nursing home."

23. The notes of Wee Waa Hospital on 14 June 2005[10] mention a history of chest pain radiating to back and shoulders. There is no mention of neck pain at that time.

24. The clinical notes of Namoi Medical Services cover a period from 1996 to 2014.[11] These notes indicate that the applicant was prescribed various medication including celebrex and other pain relief. There is no mention in the clinical notes to neck pain prior to the commencement of employment with the respondent in January 2006.

25. On 13 June 2003, in the context of prescribing celebrex and endep, Dr Verma refers to printing an education leaflet for fibromyalgia. That note is consistent with the hospital clinical note in April 2005.

26. The clinical notes of Dr Sivanathan commence in 2005. The applicant attended the doctor's practice on a number of occasions prior to the commencement of her employment with the respondent. There is no mention of neck pain in the clinical notes during that period.[12]

27. On 8 October 2007, Dr Sivanathan recorded "neck and back pains also down the R shoulder".[13]

28. In a report dated 16 December 2010, Dr Edgar, Neurosurgeon, referred to right sided neck pain present since June of that year. The Neurosurgeon noted slightly reduced sensation in the right hand in the C6 distribution and the right biceps jerk was diminished. The CT Scan was reported showing a C5/6 disc slightly prominent towards the right with some bony foraminal stenosis. The doctor recommended an MRI scan.

29. The MRI scan dated 10 January 2011 referred to right C6 radicular pain. The scan was reported by Dr George as showing a C5/6 diffuse disc bulge indenting the thecal sac.[14]

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[8] Application, p 106.
[9] Application, p 6.
[10] Application, p 105.
[11] Application, pp 135-144.
[12] Application, pp 148-152.
[13] Application, p 153..
[14] Application, p 72

30. In June 2011, Dr Edgar recommended a cervical nerve root decompression.[15] The applicant did not wish to proceed with surgery at that time.

31. In December 2014, Dr Sivanathan referred the applicant back to Dr Edgar for review of her neck pain which he described as "getting bad".[16]

32. The applicant attended Dr Samuel Hall, Neurosurgical Registrar in November 2015. He recorded a history of symptoms for approximately five years since 2011 and noted that the neck pain was the major concern previously when surgery did not proceed. The doctor noted that the applicant was then hesitant about proceeding with surgery for the arm pain.[17]

33. In October 2016, Dr Lee, Neurosurgical Registrar referred to a history of chronic neck pain which started in 2010.[18]

34. The applicant underwent bilateral C5/6 foraminotomies in December 2017.[19]

35. Dr Millons examined the applicant and provided a report dated 29 November 2018.[20] The doctor noted that the symptoms seemed to come in with a change in the ergonomics of the workplace in some nine years previously. He diagnosed a work aggravation of constitutionally based changes in the cervical spine as a result of the nature and conditions of employment with symptoms coming on in 2009.

36. Dr Millons assessed the applicant as DRE cervical category III based on the C5/6 foraminotomy, persisting upper limb symptoms and a moderate impact for the activities of daily living. This produced an assessment of 17% WPI. The doctor made a one-tenth deduction pursuant to s 323 of the 1998 Act.

37. Dr Millons provided a report dated 9 October 2019 when he reviewed Dr Machart's report dated 13 May 2019 and the records from Wee Waa Hospital.[21] The doctor observed that Dr Machart's findings and conclusions were "much in line with mine" noting a similar history of commencement of symptoms and assessment of WPI.

38. Dr Millons referred to the records from Wee Waa Community Hospital and stated:[22]

> "I have reviewed the Wee Waa Community Hospital records. There are a lot of entries there relating to possible heart issues which are without the subject claim. There is an Emergency Department attendance on 2 April 2005 noting that there was a complaint of neck pain after repetitive lifting of heavy objects.
>
> Dr Verma diagnosed fibromyalgia. There was recorded an old injury exacerbated by recent lifting. There was no indication as to what that injury might have been.
>
> It may be the case that there were some issues coming from the degenerate changes in her neck even at that time but that is the only episode of neck pain that seems to be recorded anywhere on her file. I would not see that as being anything significant. Her problems seem to have come about as a result of the gradually increasing discomfort in the neck from 2009.

[15] Application, p 76.
[16] Application, p 79.
[17] Application, p 82.
[18] Application, p 88.
[19] Application, p 91-92.
[20] Application, p 49.
[21] Application, p 60.
[22] Application, p 61.

> If it is accepted that there were issues prior to the deemed date of injury then that would be more reason to accept that a one tenth deduction in the figure of whole person impairment could be made.
>
> There does not appear to be any recorded attendance in regard to her cervical spine in Dr Verma's records which run from 16 April 2004 through 13 July 2005."

39. Dr Millons provided a further report dated 15 January 2020 which addressed issues pertaining to work capacity.[23]

40. Dr Machart initially examined the applicant on 6 May 2019.[24] The doctor noted a history of employment with the respondent over 8.5 years ceasing in 2014. He noted the work station changed in 2009 and the change in posture led to neck pain radiating into both hands.

41. After referring to various radiology, Dr Machart opined that the applicant suffered an aggravation of cervical spondylosis which was treated by surgical decompression. The doctor opined that maximum medical improvement had been attained. The doctor assessed the applicant as DRE III rated at 15% WPI, allowed an additional 2% for ADLs and noted that radiculopathy was not present. He accordingly made no allowance under Table 4.2 of the fourth edition guidelines for spinal surgery with ongoing radiculopathy.

42. Dr Machart opined that there should be a one-tenth deduction for pre-existing condition as it was "too difficult or too expensive to determine otherwise".[25]

43. Dr Machart provided a supplementary report dated 3 June 2019 which addressed various attached documentation including further scan evidence and a number of reports from neurosurgical registrars attached to Dr Edger's practice. The doctor stated that the further medical reports did not cause him to alter his previously expressed opinion.[26]

44. In his third report dated 26 February 2020[27] Dr Machart was provided with "Additional Material" and asked a series of questions. The additional material with commentary is set out at pages 2-4 of the report and includes a letter from Stacks solicitors detailing the applicant's employment history including employment with the respondent.

45. Dr Machart referred to a chronology of "neck and arm pain" and stated:

> "2005 Wee Waa Hospital, Neck pain after repetitive lifting of heavy objects, taking Celebrex, old injury exacerbated by recent lifting".

46. Dr Machart also referred to Dr Millons's reports and the records of Dr Sivanathan from 2007 until 2017.

47. In response to the questions, the Doctor noted that there were increasing symptoms post-employment although he opined that he did not see evidence that the subsequent employers were liable. He opined that the "most predominant increase was the spontaneous deterioration over time since she stopped working at Whiddon's, which reflected degenerative changes".

48. Dr Machart observed that the importance of post-employment was that the applicant was initially reasonably functional and that an increase in symptoms did not reflect "injury alone". The doctor also noted that the applicant was symptomatic prior to employment with the respondent.

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[23] Application, p 64.
[24] Reply, p 160.
[25] Reply, p 164.
[26] Reply, p 168..
[27] Late Application, p 1

49. Dr Machart opined, given the "additional information, that the s 323 deduction should be increased from one-tenth to one-third".[28]

Reasons

50. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[29] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[30]

51. The respondent accepts that the applicant has sustained injury deemed to have occurred on 19 September 2014. The consistent medical opinion is that the applicant's employment aggravated a pre-existing spondylotic condition.

52. Both Dr Machart and Dr Millons assessed the applicant as having 17% WPI. Counsel otherwise accepted that the applicant's permanent impairment was 17% WPI. In these circumstances I accept that, in accordance with the common submissions, the applicant's impairment, prior to any s 323 deduction, is 17%.

53. In reaching this assessment I rely on the accepted injury, the nature of the applicant's duties, the common opinion of Dr Machart and Dr Millons and the fact that their assessment accords with AMA 5 and the fourth edition guidelines. In that respect the applicant has undergone a foraminotomy at C5/6 and both doctors assessed the applicant at a further 2% for ADLs. Table 15-5 of AMA 5 provides that the surgical procedure equates to 15% WPI. The addition of 2% for ADLs means that the applicant has a 17% WPI.

54. The only remaining issue is the extent of the s 323 deduction.

55. A deduction pursuant to s 323 of the 1998 Act is required if a proportion of the permanent impairment is due to previous injury or due to pre-existing condition or abnormality: *Vitaz v Westform (NSW) Pty Ltd (Vitaz)*[31]; *Ryder v Sundance Bakehouse* (*Ryder*)[32]*; Cole v Wenaline Pty Ltd* (*Cole*).[33]

56. The medical evidence, consistent with the opinions of Dr Millons and Dr Machart, is that the applicant had a pre-existing spondylotic condition at C5/6.

57. Dr Millons assessed the applicant as having a one-tenth deduction. Dr Machart agreed with this opinion in his first two reports. His third report provides a reason why he changed this opinion.

58. Mr Carney appropriately conceded that a portion of the reasons provided by Dr Machart as to the change in his opinion was wrong in law. Such a concession was properly made as the reliance of subsequent deterioration was inconsistent with the decision of the Court of Appeal in *Johnson*, particularly in circumstances where Dr Machart attributed the substantial proportion of the entire impairment as resulting from the work duties with the respondent.

59. The reference to subsequent degeneration does not come within the ambit of s 323, that is by reference to a pre-existing condition. In these circumstances it is unclear as to what extent of the change in Dr Machart's opinion was based on an irrelevant consideration, that is, from the doctor's opinion that there were subsequent degenerative changes.

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[28] Late Application, p 5.
[29] The 4th edition guidelines are issued pursuant to s 376 of the 1998 Act.
[30] Clause 1.1 of the fourth edition guidelines.
[31] [2011] NSWCA 254.
[32] [2015] NSWSC 526 (*Ryder*) at [54].
[33] [2010] NSWSC 78 at [29] - [30].

60. Mr Carney submitted that, apart from this error, Dr Machart properly referred to the prior neck symptoms indicated in the Wee Waa Hospital notes in April 2005. Dr Machart concluded, presumably solely based on this note, that the applicant was "symptomatic prior to employment at Whiddon's".[34]

61. The previous clinical notes, other than the one reference in April 2005, do not refer to a neck problem although various health conditions are mentioned in the clinical notes. In these circumstances the applicant's evidence that she has no recollection of that attendance is plausible.

62. Dr Millon's opinion, set out at paragraph 38 herein, is that the one reference to neck pain should be considered in the context of an otherwise absence of complaint in the clinical notes covering a reasonable period. This opinion appears logical. Dr Machart's opinion that the applicant had a symptomatic neck condition otherwise ignores the absence of any reference to a neck problem other than in the one clinical note.

63. If Dr Machart means that the applicant was symptomatic on that occasion then his opinion is correct. However, he appears to opine that the applicant was symptomatic up to the period of employment with the respondent.

64. That conclusion is inconsistent with the applicant's evidence and the absence of reference to a neck condition elsewhere in the notes. For these reasons, I do not accept that the applicant was symptomatic up to her employment with the respondent although I accept that the applicant complained of neck pain in April 2005.

65. I also agree with Dr Millons' comment on the vagueness of the hospital clinical note. There is otherwise a reference in the April 2005 clinical note to fibromyalgia which is also mentioned by Dr Verma in his clinical notes.[35]

66. For these reasons I accept the opinion expressed by Dr Millons set out at paragraph 38 herein and the evidence of the applicant. I do not accept that the applicant was symptomatic prior to the commencement of her employment with the respondent.

67. I accept the applicant's work history and the nature of the onset of her symptoms as set out at paragraph 20 herein. There was no submission contesting the applicant's evidence as to the heavy arduous work that aggravated her condition.

68. I do not accept Dr Machart's opinion that the applicant was asymptomatic prior to employment, although I accept that the applicant complained of neck pain on one occasion.

69. The statutory deduction of one-tenth is set out in s 323(2) which relevantly provides:

> "(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.
>
> (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter."

[34] Late Application, p 5
[35] Application, p 141

70. Section 323(3) of the 1998 Act provides meaning to the reference in s 323(2) of "available evidence". I do not accept, for the reasons given, Dr Machart's opinion that the s 323 deduction should be 30%.

71. For these reasons, I accept Dr Millons' opinion that the s 323 deduction should be one-tenth in accordance with s 323(2) of the 1998 Act. Such a finding is not "at odds with the available evidence". This opinion is consistent with that expressed on two occasions by Dr Machart. For the reasons provided, I do not accept the reasons expressed by Dr Machart for the change in his opinion.

72. Given the unanimous medical opinion and the duration of symptoms, the applicant's impairment is permanent and results from injury.

OTHER OBSERVATION

73. My reasons should not be taken as expressing a view that the Commission should regularly determine permanent impairment. The facts of this matter were unique. My reasons indicate that the medical opinions on assessment were consistent save as to one matter. The determination of WPI could be properly made by the Commission as the change in Dr Machart's opinion on the s 323 issue could be rejected on an analysis of the facts based on a reading of contemporaneous notes. Upon rejecting the reasons for the change in Dr Machart's opinion, the ultimate decision was that there was only one clear outcome of the assessment for the applicant's WPI.

CONCLUSIONS

74. The findings and orders are set out in the Certificate of Determination.